



## **DEPARTMENT OF LABOR**

### **Occupational Safety and Health Administration**

**[Docket No. OSHA-2007-0031]**

#### **Nationally Recognized Testing Laboratories; Proposed Revised Fee Schedule and Proposed Adoption of New Application Acceptance and Review Procedures**

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice.

**SUMMARY:** In this notice, OSHA proposes to revise the schedule of fees that the Agency charges to Nationally Recognized Testing Laboratories (NRTLs) and NRTL applicants. In addition, OSHA proposes to adopt new streamlined procedures for accepting and reviewing applications of organizations seeking to obtain, renew, or expand NRTL recognition.

**DATES:** Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit comments by any of the following methods:

1. Electronically: Submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

2. Facsimile: If submissions, including attachments, are not longer than 10 pages, commenters may fax them to the OSHA Docket Office at (202) 693-1648.

3. Regular or express mail, hand delivery, or messenger (courier) service: Submit comments, requests, and any attachments to the OSHA Docket Office, Docket No. OSHA-2007-0031, Technical Data Center, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-2625, Washington, DC 20210; telephone: (202) 693-2350 (TTY number: (877) 889-5627). Note that security procedures may result in significant delays in receiving comments and other written materials by regular mail. Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express mail, hand delivery, or messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m. - 4:45 p.m., e.t.

4. Instructions: All submissions must include the Agency name and the OSHA docket number (OSHA-2007-0031). OSHA places comments and other materials, including any personal information, in the public docket without revision, and these materials may be available online at <http://www.regulations.gov>. Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

5. Docket: To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or to the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the web site. All submissions, including copyrighted material, are available for

inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

6. Extension of comment period: Submit requests for an extension of the comment period on or before [INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-3655, Washington, DC 20210, or by fax to (202) 693-1644.

**FOR FURTHER INFORMATION CONTACT:**

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-3647, Washington, DC 20210; telephone: (202) 693-1999; email: [meilinger.francis2@dol.gov](mailto:meilinger.francis2@dol.gov).

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-3655, Washington, DC 20210; phone: (202) 693-2110 or email: [robinson.kevin@dol.gov](mailto:robinson.kevin@dol.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

OSHA proposes to adopt new streamlined procedures for accepting and reviewing applications of organizations seeking to obtain, renew, or expand NRTL recognition, and to revise the existing NRTL Program fee schedule pursuant to the NRTL Program

regulation, 29 CFR 1910.7(f). Section III of this notice covers the proposed adoption of new application acceptance and review procedures, and Section IV covers the proposed revision of the fee schedule.

## **II. Background on the NRTL Program**

Many of OSHA's safety standards (e.g., 29 CFR 1910, Subpart S) require that equipment and products be tested and certified to help ensure their safe use in the workplace. To implement these requirements, OSHA established the NRTL Program and the Agency generally requires NRTLs to perform this testing and certification.

The NRTL Program regulation, 29 CFR 1910.7, requires that, to obtain and retain OSHA recognition as an NRTL, an organization must: (1) have the appropriate capability to test, evaluate, and approve products to assure their safe use in the workplace; (2) be completely independent of employers subject to the tested equipment requirements and manufacturers and vendors of products for which OSHA requires certification; (3) have internal programs that ensure proper control of the testing and certification process; and (4) have effective reporting and complaint handling procedures (29 CFR 1910.7(b)). OSHA requires organizations applying for NRTL recognition to provide, in their applications, detailed and comprehensive information about their programs, processes, and procedures, in writing. When an organization makes an initial application to be recognized as an NRTL, OSHA reviews the written information contained in the organization's application and conducts an on-site assessment to determine whether the organization meets the requirements of 29 CFR 1910.7. OSHA uses a similar process when an NRTL applies for expansion or renewal of its recognition, although the type and amount of information in some areas can differ significantly from those of initial applications. In addition, the

Agency conducts annual assessments<sup>1</sup> of NRTLs to ensure that the recognized laboratories adequately maintain their programs and continue to meet the recognition requirements.

To support these core functions, OSHA also performs a number of ancillary activities. For example, OSHA: investigates complaints filed against NRTLs to ensure that the laboratories are performing their testing and certification functions adequately; represents the NRTL Program in a variety of forums related to conformity assessment products used in the workplace; and maintains a detailed web site that both explains the program and, more importantly for the NRTLs, lists all the laboratories currently recognized under the NRTL Program, the products each laboratory can test, and registered certification marks used by each laboratory.

### **III. Proposed revision of existing application acceptance and review procedures.**

OSHA currently has a number of initiatives underway to improve the operations of the NRTL Program. This section of the notice discusses one such initiative, under which OSHA proposes new streamlined procedures for accepting and reviewing applications of organizations seeking to obtain, renew, or expand NRTL recognition. OSHA would follow these new procedures in lieu of those contained in the Agency's existing NRTL Program Directive (CPL 1-0.3, NRTL Program Policies, Procedures, and Guidelines, December 2, 1999) ("Directive" or "NRTL Program Directive") and the additional practices OSHA has routinely followed in accepting applications.

OSHA proposes the adoption of the new streamlined procedures to eliminate delays caused by multiple revisions by an applicant during the application-acceptance and -review

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<sup>1</sup>OSHA uses the term "assessments" to mean those activities described by the term "audits" under 29 CFR 1910.7(f). OSHA uses the term "assessments," rather than "audits" because it better reflects the overall purpose of the program's activities, i.e., conformity assessments.

process. In addition, OSHA seeks to simplify the application process to make it clearer when the application acceptance process ends and the substantive application review process begins. This streamlined application process would also reduce NRTL Program fees, as OSHA will discuss later in this notice.

The existing procedures for application acceptance and review are contained in both Appendix A to the NRTL Program regulations (“Appendix A”) and the NRTL Program Directive. OSHA does not propose, in this notice, to revise Appendix A; instead, as stated, OSHA proposes to follow new streamlined procedures in lieu of the existing procedures in the Directive. The new streamlined procedures would be consistent with, and would clarify, the procedures contained in Appendix A.

A. Existing procedures in Appendix A that are not subject to revision in this notice.

Per Appendix A, the burden is generally “on the applicant to establish by a preponderance of the evidence that it is entitled to recognition as an NRTL” (App. A. Introduction). Thus, in its application, an applicant must “provide sufficient information and detail demonstrating that it meets the requirements set forth in §1910.7, in order for an informed decision concerning recognition to be made” by the Assistant Secretary for Occupational Safety and Health (“Assistant Secretary”), and must also “identify the scope of the NRTL-related activity for which the applicant wishes to be recognized” (i.e., the test standards the applicant will use for testing products) (App. A.I.A.2.b). To meet its burden, the applicant may include any documentation (i.e., enclosures, attachments, or exhibits) it deems appropriate (App. A.I.A.2.c).

Also under Appendix A, “[a]pplications submitted by eligible testing agencies will be accepted by OSHA, and their receipt acknowledged in writing” (App. A.I.B.1.a).

Moreover, “[a]fter receipt of an application, OSHA may request additional information if it believes information relevant to the requirements for recognition has been omitted” (*Id.*). In addition, “OSHA shall, as necessary, conduct an on-site review of the testing facilities of the applicant, as well as the applicant’s administrative and technical practices, and, if necessary, review any additional documentation underlying the application” (App. A.I.B.1.b).

Appendix A provides the responsible OSHA staff with two options following review of the application, and any additional information and on-site review report. On the one hand, if “the applicant appears to have met the requirements for recognition,” responsible OSHA staff must make a “positive finding” to the Assistant Secretary, which consists of “a written recommendation . . . that the application be approved, accompanied by a supporting explanation” (App. A.I.B.2). Once this recommendation is made, OSHA follows the procedures in the Appendix for making preliminary and final findings on the application (App. A.I.B.4, A.I.B.5, A.I.B.6).

On the other hand, if “the applicant does not appear to have met the requirements for recognition,” responsible OSHA staff must make a “negative finding” to the “applicant in writing, listing the specific requirements of §1910.7 and [Appendix A] which the applicant has not met, and allow[ing] a reasonable period for response” (App. A.I.B.3.a). After the applicant receives “a notification of negative finding (i.e., for intended disapproval of the application), and within the response period provided,” the applicant may either (1) “[s]ubmit a revised application for further review, which could result in a positive finding” (the procedures for which are explained in the previous paragraph), or (2) “[r]equest that the original application be submitted to the Assistant Secretary with an attached statement

of reasons, supplied by the applicant of why the application should be approved” (App. A.I.B.3.b.i). In either case (i.e., if a positive finding is made on a revised application or if the applicant requests that the original application be submitted to the Assistant Secretary), OSHA would follow the procedures in the Appendix for making preliminary and final findings on the application (App. A.I.B.4, A.I.B.5, A.I.B.6). The “procedure for applicant notification and potential revision shall be used only once during each recognition process” (App. A.I.B.3.b.ii).

B. OSHA proposes that it will no longer follow existing NRTL Program Directive procedures for accepting and reviewing applications.

Existing policies contained in the NRTL Program Directive expand on the application procedures contained in Appendix A, as follows. Per the Directive, OSHA staff “formally accept or reject the application” based on a review of the application for “completeness and for adequacy” (Directive Ch.2.V.B, Ch. 3.II.B.1). The procedures for this review are contained in Appendix D to the Directive (Directive Ch. 3.II.B.1). An application is considered complete “if it contains all necessary documents, and sufficient information for all relevant items,” and is considered adequate “if the information submitted sufficiently demonstrates that the requirements for recognition can be met, and where relevant, **if at least one test standard requested can be approved**” (Directive App. D) (emphasis in original).

In reviewing the application, OSHA staff will return and “take[] no further action” on an application “[i]f [the] application is frivolous or grossly incomplete or inadequate.” In such circumstances, “any future application from the applicant” will be processed “as a new application” (Directive Ch. 3.II.A).



If the application is not “frivolous or grossly incomplete or inadequate,” OSHA staff discusses its review with the applicant, “noting any deficiencies found or clarifications needed” (Directive Ch. 3.II.B.2). If the “application is determined to be complete and adequate,” OSHA “sends a letter to the applicant to accept the application” (Directive Ch. 3.II.C).

If the application is determined to be incomplete or inadequate, the Directive provides two opportunities for applicants to correct deficiencies before rejection of an application (Directive Ch. 3.II.C). In practice, however, OSHA has given applicants three such opportunities. Per the Directive, OSHA “sends a letter to the applicant, detailing the deficiencies and the additional information needed and requesting a response by an appropriate deadline,” and if “the response does not adequately resolve the deficiencies,” OSHA “provides the applicant a [second] opportunity to respond within a given period.” (Directive Ch. 3.II.C.) If deficiencies remain after the second opportunity, OSHA, in practice, gives applicants a third, but relatively limited, opportunity to make corrections before the effective date of the rejection. This limited duration is sufficient for applicants to correct deficiencies if only a few critical deficiencies remain.

If an applicant’s timely response cures the deficiencies in its application, OSHA “sends an acceptance letter to the applicant” (Directive Ch. 3.II.C). However, “[i]f the applicant does not respond adequately or fails to reply by any deadline(s) provided or an approved extension of these deadline(s),” OSHA “sends a letter notifying the applicant that the application is not accepted and the Case File is closed” (Directive Ch. 3.II.C.2).

Finally, the Directive provides that, after an application is accepted, “the assigned staff determines whether an on-site review is necessary” (Directive Ch.3.II.D). However, the

Directive also provides for non-acceptance during the on-site review process, if an applicant fails to respond adequately to the findings of an on-site review (Directive Ch.4.IV.C).

Under OSHA's proposal, it would no longer follow the existing procedures, described above, to afford applicants three opportunities to modify their applications before acceptance or non-acceptance. This existing procedure is inefficient and causes delays because, in some cases, these multiple opportunities cause the process to take years. OSHA would also not follow its existing procedure for accepting an application only when it is found to be complete and adequate. This existing procedure has caused confusion as to when the application acceptance process ends and the substantive application review process begins.

C. OSHA proposes new streamlined procedures for accepting and reviewing applications.

In lieu of the existing NRTL Program Directive procedures, described above, OSHA proposes to follow streamlined procedures for accepting and reviewing applications. These streamlined procedures would reduce delays, fees, and confusion associated with application processing. Under these streamlined procedures, OSHA would review an application for completeness, but not adequacy, in deciding whether to accept the application. OSHA's review for adequacy, and any on-site review, would occur only after OSHA accepted the application. Furthermore, OSHA would permit the applicant one opportunity only, rather than three, to resolve deficiencies in the completeness of its application before deciding whether to accept it. OSHA describes these proposed streamlined procedures in more detail, below.

### 1. Initial Review and Acceptance

When it receives an application, OSHA would acknowledge its receipt, establish (for initial applications) or update (for expansion and renewal applications) the docket for the organization, and upload the application materials to the docket.<sup>2</sup> OSHA would perform an administrative review of the application to determine whether it is complete (i.e., has sufficient information to determine whether the applicant meets the requirements for recognition). If not complete, OSHA would notify the applicant, in writing, that it has 30 days from the date of the notice to provide the missing or additional information. OSHA would also inform the applicant, in the notice, that it is unable to review the merits of the application because the application itself does not contain sufficient information to show that the requirements for recognition can be met. Finally, OSHA would inform the applicant, in the notice, that this review involved no technical determination, only an administrative one of whether the application has all of the necessary documentation. If the applicant does not respond by the 30-day deadline, or does not adequately respond, and the application remains incomplete, OSHA would inform the applicant that OSHA cannot accept the application, and the applicant must reapply. If the applicant provides a complete application within the 30 days, or provided a complete application when it was first received, OSHA would accept the application.

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<sup>2</sup>As currently used by OSHA, the term “docket” means an electronic file folder containing documents that pertain to an official action taken by the Agency. OSHA generally makes these documents available to the public.

## 2. Determination of Adequacy

After accepting the application, OSHA would review the merits of the application to determine whether the application is adequate. OSHA would first conduct a technical review of the application (i.e., a detailed review of all of the application's administrative and technical procedures and content). Following this technical review, OSHA would determine whether to conduct an on-site assessment as part of evaluating the management system and technical capabilities of the organization. OSHA would generally conduct an on-site review for initial applications and for expansion applications that involve new areas of testing for the NRTL or areas of concern to OSHA. If OSHA finds deficiencies during the technical review or during the on-site assessment, OSHA would provide the applicant with an explanation of deficiencies and needed corrections, and a 90-day opportunity to respond. Failure to respond by the 90-day deadline would constitute a withdrawal of the application, and OSHA would take no further action on it. If the applicant or NRTL responds, it would need to demonstrate it corrected all deficiencies found in its application and/or during the assessment, and provide evidence to OSHA that the corrections have been implemented into the applicant's or NRTL's management systems. In that case, OSHA would conclude the application is adequate. On the other hand, if OSHA finds that deficiencies remain, OSHA would conclude the application is not adequate.

If OSHA staff determines an application is adequate, OSHA would follow existing procedures, and recommend a positive finding, per Appendix A.I.B.2. Otherwise, OSHA staff would notify the applicant in writing that they intend to recommend a negative finding. In that case, the applicant has two options under Appendix A.I.B.3. First, the applicant has one additional chance to revise its application within 30 days of receipt of

OSHA's written notice. Second, the applicant may request that its original application (as supplemented in response during the review for adequacy) be submitted to the Assistant Secretary (also within 30 days of receipt of OSHA's written notice). In this case, the applicant must attach a statement of reasons to the application explaining why the application should be approved. OSHA would consider the failure to submit a revised application or a request that the original application be submitted to the Assistant Secretary within the 30-day deadline to be a withdrawal of the application.

If the applicant opts to revise its application, OSHA would invoice the applicant for the fee to review its revised submission. This fee would equal the estimated hours for the review multiplied by the hourly rate for the applicable Miscellaneous Fee in the NRTL Program's fee schedule. Like other application fees, this review fee would not be refundable. The applicant would need to pay this fee before OSHA performs the review of the revised application. OSHA would consider a failure to pay the fee within 30 days of receipt of the invoice as a withdrawal of the application. When OSHA receives the fee, OSHA would review the revised application to determine whether to sustain the negative finding or change it to a positive one. If OSHA staff decides to sustain the recommendation for a negative finding, they would first afford the applicant the opportunity to withdraw the application. If the applicant does not withdraw it, OSHA would proceed with the preliminary finding.

Once OSHA staff recommends a positive finding on either an original or revised application, sustains its recommendation for a negative finding after a review of a revised application, or the applicant requests that the original application be submitted to the

Assistant Secretary, OSHA would follow the procedures in Appendix A for making preliminary and final findings on the application (App. A.I.B.4, A.I.B.5, A.I.B.6).

#### **IV. Proposed Revision of the NRTL Program Fee Schedule**

##### **A. Background**

OSHA proposes to revise the existing NRTL Program fee schedule pursuant to the NRTL Program regulation, 29 CFR 1910.7(f). That regulation requires NRTLs and applicants to “pay fees for services provided by OSHA in advance of the provision of those services” (29 CFR 1910.7(f)(1)). OSHA assesses fees for core service activities, that is, for “[p]rocessing of applications for initial recognition, expansion of recognition, or renewal of recognition, including on-site reviews; review and evaluation of the applications; and preparation of reports, evaluations and Federal Register notices;” and “[a]udits of sites” (*Id.*). OSHA’s fee schedule “reflects the full cost of performing the activities” for these services (29 CFR 1910.7(f)(2)).

OSHA calculates fees “based on either the average or actual time required to perform the work necessary; the staff costs per hour (which include wages, fringe benefits, and expenses other than travel for personnel that perform or administer the activities covered by the fees); and the average or actual costs for travel when on-site reviews are involved” (*Id.*). Thus, the formula for calculating a fee for an activity is the “[Average (or Actual) Hours to Complete the Activity x Staff Costs per Hour] + Average (or Actual) Travel Costs” (*Id.*).

OSHA periodically reviews the full costs of performing core services and, if warranted, will propose a revised fee schedule in the Federal Register (29 CFR 1910.7(f)(3), (f)(4)). If OSHA approves the proposed fee schedule (after giving the public an opportunity to

comment), it “publish[es] the final fee schedule in the Federal Register, making the fee schedule effective on a specific date” (29 CFR 1910.7(f)(3), (f)(4)).

To ensure that its fees for core services reflect the full cost of those services, OSHA’s existing fee schedule (which OSHA adopted in 2011) takes into account both the direct and indirect costs it incurs in performing those services (76 FR 10501-10504). Direct costs include staff costs (i.e. the applicable portion of the salaries and fringe benefits of the applicable staff) incurred for application processing and assessment (*Id.*). Ancillary (or indirect) costs include staff costs incurred for the administration and support of the program, including legal support, budgeting, policy matters, intragency and international coordination, responses to requests for information related to the program, handling complaints, web site development and maintenance, and participation in meetings with stakeholders and outside interest groups (*Id.*). OSHA refers to the sum of its direct costs and ancillary costs as the total program costs (TPC) for the purpose of this notice. TPC does not include travel expenses, which are assessed separately (29 CFR 1910.7(f)(2), 76 FR 10504 n.5).

In the existing fee schedule, OSHA calculates the fee for each core service activity by multiplying an equivalent average cost per hour rate (ECR) by the time it takes to perform that activity: Fee for Activity = ECR x Time for Activity (76 FR 10504). In 2000, when OSHA began assessing fees for services, OSHA explained that it derived that fee schedule’s ECR by dividing TPC by the total available annual work hours of the NRTL Program and legal staff that perform the services (TAW) (*Id.*). Accordingly,  $ECR_{2000} = TPC_{2000} / TAW_{2000}$ . The approach used in 2000 resulted in fees that recouped the costs only of the time spent actually performing individualized audits and application

processing, which is only a portion of TAW, and did not recoup the costs of the time associated with running the program and providing other benefits shared among all NRTLs (*Id.*).

To account for the costs associated with these shared benefits, OSHA adopted a new approach for calculating ECR (ECR2011) in the existing fee schedule (*Id.*). Under the new approach, OSHA divides the estimated total cost of the NRTL Program (TPC2011) by the total annual service hours (TAS2011) (*Id.*). This latter term equals the total estimated work hours that the NRTL Program staff spend on the core service activities for which OSHA would bill NRTLs; accordingly,  $ECR2011 = TPC2011 / TAS2011$  (*Id.*). By way of comparison with the 2000 fee schedule, TAS equals TAW minus estimated hours spent on ancillary activities (AH) and leave (LH) (i.e.,  $TAS = TAW - AH - LH$ ) (*Id.*). By continuing to include the full program costs in the numerator (TPC2011), but including in the denominator (TAS2011) only the amount of time spent on providing “billable” core services, OSHA believed the revised ECR would more accurately represent the total work hours spent on those core activities than the 2000 equation<sup>3</sup> (*Id.*).

#### B. Explanation of Proposed Revision of Fee Schedule

OSHA has reviewed its existing fee schedule and, based on that review, proposes to revise its fee schedule. This proposed fee schedule would more accurately reflect the full cost of performing the activities for which OSHA charges fees.

OSHA proposes the following:

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<sup>3</sup> The existing fee schedule was supposed to have been phased in over a three-year phase-in period. (76 FR 10508). OSHA implemented the first phase on March 28, 2011. However, due to other priorities and factors, OSHA was unable to implement the second and third phases of the increase, as planned. The revised fee schedule OSHA proposes in the current notice would render moot the implementation of the second and third phases.



1. OSHA proposes a new grouping of fees for each of the core activities for which OSHA charges fees to NRTLs (i.e., “[p]rocessing of applications for initial recognition, expansion of recognition, or renewal of recognition, including on-site reviews; review and evaluation of the applications; and preparation of reports, evaluations and Federal Register notices;” and “[a]udits of sites” (29 CFR 1910.7(f)(1)). Under the existing fee schedule, OSHA groups these activities under the terms Application Processing, Audits, and Miscellaneous (76 FR 10508). Under OSHA’s proposed fee schedule, shown below in Table A, OSHA would group these activities under the terms: Administrative Evaluation, Technical Evaluation, Assessments, Federal Register Notices, and Miscellaneous (which includes late fees and other activities not specifically described). OSHA proposes these new groupings to align its fee schedule with the proposed streamlined procedures for accepting and reviewing applications, described above. OSHA also believes that the times it proposes estimating for completion of these activities (see Tables 2 thru 5, below) more accurately represent the actual time it takes to complete the core activities for which OSHA charges fees. Therefore, adoption of the proposed groupings would more accurately reflect the full cost of the services for which fees are assessed.

2. OSHA proposes to revise the approach it uses to calculate ECR. Again, under the existing approach, OSHA calculates ECR by dividing TPC by the total estimated work hours that the NRTL Program staff and legal staff spend on the core service activities for which OSHA bills NRTLs (or TAS) (76 FR 10504).

The existing approach depends, in large measure, on OSHA estimating an accurate TAS (i.e., number of “billable” core hours). If this estimate is accurate, the ECR (i.e., the hourly rate OSHA charges for services) will accurately reflect the full cost of services

(because  $ECR = TPC/TAS$ ). But OSHA's estimate has not been accurate in practice. Due in part to insufficient program staffing and other uncontrollable factors, the staff has been unable to work the number of estimated billable hours. This has resulted in an hourly rate charged by OSHA that results in fees that are far lower than the fees OSHA would be charging if its estimate had been accurate.

OSHA could reassess TAS on a regular basis to achieve a more accurate estimate. However, due to the changing nature of the staff's workload, OSHA likely would need to make such calculation adjustments, and thus publish fee schedules, more than once within a given year to ensure an accurate estimate. OSHA likely could not make such adjustments in a timely manner, largely due to the length of the process for issuing fee schedules.

OSHA proposes to simplify the existing calculation; for the purpose of the fees proposed in this notice, OSHA would assume that certain NRTL Program staff (which OSHA calls "direct staff" in this notice) work exclusively on core billable activities, and that other NRTL Program staff (which OSHA calls "indirect staff" in this notice) work exclusively on ancillary activities. Under the proposal, OSHA would calculate the ECR (ECR2015) by dividing TPC by total direct staff annual paid (i.e., compensable) hours, or simply, direct staff annual hours (DSH).

Because of the difficulties of implementing the existing approach, OSHA believes the proposed change in approach (replacing TAS with DSH) would, on average *and* in practice, more accurately reflect the full cost of services for which OSHA charges fees than the existing approach. The accuracy of the DSH approach also does not depend on the variable workload of staff, and would therefore be simpler to implement than the existing approach.

OSHA estimates for the proposal that four full-time NRTL Program staff members are direct staff and the other full-time NRTL Program staff member is indirect staff. OSHA believes the estimate of four full-time direct staff is reasonable because OSHA projects a significant increase in the number of applications the NRTL Program will process and audits the NRTL Program will perform (i.e., a significant increase in the time NRTL Program staff will spend on core activities).

For the purposes of the proposed fee calculation, DSH would equal 8,352 hours. This is derived by multiplying 2,088, the regular annual paid hours for one full-time staff, by the number of full-time direct staff<sup>4</sup> (again, currently four).

3. OSHA proposes to break out the fees for the legal review of Federal Register notices associated with initial, renewal, and expansion applications from the general fees it charges for preparation of these Federal Register notices by NRTL Program staff. Under the existing fee structure, OSHA charges one general fee that covers both preparation and legal review of a Final Report and Federal Register notice (76 FR 10505-10511).<sup>5</sup>

OSHA proposes this revision to more accurately reflect the portion of the fees attributed to legal review. Under the existing fee structure, OSHA charges a single hourly rate for core activities, regardless of whether the time charged is attorney time or NRTL Program staff time (76 FR 10505). Under the proposed fee structure, OSHA calculates a

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<sup>4</sup>This figure is the number of compensable hours in a fiscal year, which is used to determine full-time equivalents (FTE) (i.e., full-time staffing levels) for purposes of the Federal Budget. See Office of Management and Budget (OMB) Circular A-11, Preparation, Submission, and Execution of the Budget, Section 85—Estimating Employment Levels and the Employment Summary (Schedule Q), 2015 (available at [http://www.whitehouse.gov/sites/default/files/omb/assets/a11\\_current\\_year/s85.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s85.pdf)).

<sup>5</sup>Although OSHA did not state explicitly in the 2011 notice that the Final Report and Federal Register notice fee included legal review, the hours used for calculating this fee did in fact include the legal staff's time for this review.

separate hourly rate for core activities performed by legal staff to reflect that certain ancillary costs, such as web site development and maintenance, which are properly incorporated into the hourly rate for NRTL Program staff, should not be incorporated into the hourly rate for legal services. OSHA would continue to incorporate in the hourly rate for legal costs those indirect costs that tie directly into the salary of legal staff, such as fringe benefits. As a result of the proposed change, the hourly rate for legal fees, shown in Table 5, would be less than the rate for NRTL Program staff fees, shown in Table 1.

OSHA notes that the Department of Labor incurs legal costs in connection with the NRTL Program other than costs associated with the legal review of Federal Register notices associated with initial, renewal, and expansion applications. These other legal costs are included in the existing fee schedule (See 76 FR 10504 n.5), and would continue to be included in the proposed fee schedule, as elements in TPC, and therefore, as elements of the calculation of the hourly rate for NRTL Program staff.

4. OSHA proposes to revise the manner it calculates the salaries of NRTL Program staff and Solicitor of Labor staff for the purpose of calculating TPC. For the existing fee schedule, OSHA calculates staff costs using actual staff salaries, which can vary, sometimes significantly, over time due to changes in personnel and positions. OSHA proposes to calculate salaries using midpoint salaries. These midpoint salaries are the Step 5 amounts shown for a particular grade (e.g., grade 13) in the Office of Personnel Management (OPM) General Schedule (GS) salary table for 2015, called the “Salary Table 2015-DCB,” which pertains to federal workers who have duty stations located mostly in Washington, D.C, Maryland, and Virginia. (See Office of Personnel Management 2015 General Schedule (GS) Locality Pay Tables at [www.opm.gov](http://www.opm.gov).) These midpoint salaries

may differ from actual staff salaries, which depend on the actual grade and step for each staff. However, using these midpoint figures would simplify the calculation of the staff costs and provide a consistent fee that OSHA expects will reflect, on average, actual staff salaries over time. Because OPM adjusts its salary tables annually, OSHA would monitor the adjustments to determine if their magnitude requires modification of the fee schedule.

Also, to include an amount for regular fringe benefits, OSHA would multiply the midpoint salaries by a fringe benefit rate. OSHA proposes to use a 29% rate, and bases this rate on the one the Agency uses to estimate fringe costs of other OSHA activities.

5. OSHA proposes to revise the manner in which it calculates ancillary (or indirect) costs. Under the existing fee schedule, OSHA includes, in its calculation of ancillary (or indirect) costs, equipment, training, and space of the staff. Under the proposed fee schedule, OSHA would not include these items in its calculation of ancillary costs because NRTLs do not derive a special benefit from these cost items. For example, training costs for the program staff currently consist of general training available to all employees. OSHA would include such costs in future fee schedules if it determines that NRTLs do derive special benefits from the items. OSHA believes the proposed revision to the fee schedule would more accurately reflect the full costs of performing the activities for which OSHA charges fees.

6. OSHA proposes to not charge fees for determining whether proposed test standards are appropriate test standards under the NRTL Program. OSHA charges such fees under the existing fee schedule. However, OSHA recently updated its process whereby it incorporates new test standards into the NRTL Program's list of appropriate test standards (the scope of an appropriate test standard must cover products for which OSHA requires

NRTL approval and must meet the requirements of 29 CFR 1910.7(c)(1)). Under the updated policy, OSHA adds new test standards when it is made aware of new test standards and determines them appropriate (79 FR 17188). It is therefore no longer necessary to charge NRTLs specific fees in connection with the incorporation of standards into the list of appropriate test standards. OSHA notes, however, that the costs associated with the incorporation of test standards would be ancillary costs under the proposed fee schedule, and would therefore be an element in the calculation of the fees OSHA proposes to assess.

### C. Basis and Derivation of Proposed Fee Amounts

Table 1, below, shows the direct and indirect program costs (TPC), direct staff annual hours (DSH), and hourly rate OSHA proposes to use to calculate the revised fees.

**Table 1.** NRTL Program Staff – Hourly Rate Calculation

<b>Description</b>	
OSHA Direct Costs	\$579,383
OSHA Ancillary Costs	\$287,541
<i>OSHA Total Costs of NRTL Program, excluding travel (TPC)</i>	<i>\$866,924</i>
<i>OSHA Direct Staff Annual Hours (DSH)</i>	<i>8,352</i>
<b>OSHA Hourly rate (TPC divided by DSH)</b>	<b>\$104</b>

Tables 2 to 5, below, describe the fees OSHA proposes to adopt in conjunction with the core services for which OSHA charges fees. OSHA would calculate each fee (with the exception of fees for legal review of Federal Register notices) by multiplying the NRTL Program staff hourly rate of \$104 (see Table 1, above) by the time OSHA estimates it takes NRTL Program staff to perform the activity at issue, on average (i.e., fee for activity = NRTL Program staff hourly rate (\$104) X estimated time for activity). OSHA would calculate the fees for legal review of Federal Register notices by multiplying the hourly rate for legal services of \$89 (see Table 5, below) by the time OSHA estimates its takes

legal staff to perform the activity at issue, on average (i.e., fee for activity = legal staff hourly rate (\$89) X estimated time for activity). OSHA notes that it rounds the proposed fees down to the lower multiple of ten.

OSHA's proposed (and existing) fee for travel related to assessments is based on actual travel expenses, and thus OSHA does not derive a fee to charge for travel.

**Table 2.** Proposed Fees for Administrative Evaluation

<b>Program Component</b>	<b>Average Hours</b>	<b>Fee</b>
Initial Application - Limited review (per application)	40	\$4,160
Expansion Application - Limited review (per application)	24	\$2,490
Renewal request review	16	\$1,660

**Table 3.** Proposed Fees for Technical Evaluation

<b>Program Component</b>	<b>Average Hours</b>	<b>Fee</b>
Initial Application - Management Procedures review (per application)	80	\$8,320
Initial or Expansion Application - Testing capability review (per standard)	24	\$2,490
Initial or Expansion Application - Site capability review (per site)	24	\$2,490

**Table 4.** Proposed Fees for Assessments

<b>Program Component</b>	<b>Average Hours</b>	<b>Fee</b>
Assessment preparation and close out (per lead auditor)	54	\$5,610
Assessment preparation and close out (per assistant auditor)	32	\$3,320
Each day on-site or at office (per auditor)	8	\$830

**Table 5.** Proposed Fees for Federal Register Notices

<b>Program Component</b>	<b>Average Hours</b>	<b>Fee</b>
Initial Application <u>Federal Register</u> notice preparation (per application)**	20	\$4,080
Initial Application <u>Federal Register</u> notice legal review (per application)	16	\$1,420
<b>Total for Initial Application <u>Federal Register</u> notices</b>	<b>36</b>	<b>\$5,500</b>

Renewal or Expansion Application <u>Federal Register</u> notice preparation (per application)**	16	\$2,470
Renewal or Expansion Application <u>Federal Register</u> notice legal review (per application)	8	\$710
<b>Total for Renewal or Expansion Application <u>Federal Register</u> notices</b>	<b>24</b>	<b>\$3,180</b>

\*\*Includes estimated Office of Federal Register (OFR) processing fees: \$2,000 per initial application notice, or \$810 per expansion and renewal notice, as applicable.<sup>6</sup>

#### D. Proposed Fee Schedule and Description of Fees

OSHA proposes the adjusted fee schedule shown below in Table A.

**Table A. Proposed NRTL Program Fee Schedule**

<b>Fee Category</b>	<b>Fee Activity</b>	<b>Fee *</b>
Administrative Evaluation	Initial application – Limited review	\$4,160
	Expansion application – Limited review	\$2,490
	Renewal request review	\$1,660
Technical Evaluation	Initial application – Detailed management procedures review	\$8,300
	Initial or Expansion application - Testing capability review (per standard)	\$2,490
	Initial or Expansion application - Site capability review (per site)	\$2,490
Assessment	Assessment preparation and close out (per lead auditor, per site)	\$5,610
	Assessment preparation and close out (per assistant auditor, per site)	\$3,320
	Assessment – per day at office, on-site, or on travel (per auditor, per site)	\$830 plus travel expenses
<u>Federal Register</u> Notices	<u>Federal Register</u> notices – initial application	\$5,500
	<u>Federal Register</u> notices – renewal or expansion application	\$3,180
Miscellaneous	Late Fees	\$210
	Other activities or services not specifically described (per hour)	\$104

\*All fees must be paid in advance of activity or service

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<sup>6</sup>The OFR charges Federal agencies a per column rate for publishing Federal Register notices. See <http://www.archives.gov/federal-register/write/conference/publishing-billing.pdf>. OSHA derived an estimated average processing fee based on the number of columns in typical Federal Register notices published for the NRTL Program.



## **General information regarding the fees**

### **1. Explanation of Fees**

- The Administrative Evaluation fee covers an administrative review of the application packet to ensure completeness. It also covers creating the docket and addition of the application to the docket. An applicant must submit this fee with the application.
- The Technical Evaluation fee covers a detailed examination of the application packet to determine the applicant's ability to meet the requirements of the requested recognition/expansion. An applicant must submit this fee with the application.
- On-site or office assessment fees are calculated based on estimated staff time and, if applicable, actual travel expenses. Travel expenses include expenses for hotel, air transportation, ground transportation, and per diem. The assessment preparation and close-out fees (per lead and assistant auditor, as applicable) include staff time to make travel arrangements and file travel reimbursement claims. At the conclusion of the assessment, actual travel expenses are calculated based on the government per diem and other travel rules. OSHA will bill or refund the difference between the prepaid and the actual travel amounts.
- The fees for "Other activities or services not specifically described" cover application- or assessment-related activities that are not specifically covered by the other fee categories. One example would be the technical review of a revised application that an applicant submits to OSHA in response to OSHA's negative finding on an applicant's original application.

## 2. Refunds

- If an application is withdrawn before OSHA commences the Technical Evaluation, or the application is rejected after OSHA completes the Administrative Evaluation, OSHA will refund the Technical Evaluation fee.
- If an application is withdrawn before OSHA commences travel to a site to perform an on-site assessment, the Agency will refund any prepaid assessment fees.

3. Late Fees/Failure to Pay. If an invoice is not paid in full by the due date, the Late Payment fee will be assessed. If payment for an application is not received within 30 days of the invoice's original due date, the application will be rejected. If payment for an assessment is not received within 30 days of the invoice's original due date, OSHA will commence the process to revoke the NRTL's recognition (see 29 CFR 1910.7, App. A.II.E). OSHA notes that NRTLs or applicants may be subject to collection procedures under U.S. Federal law for unpaid fees.

4. Changes to Fee Schedule. The effective date of this fee schedule is thirty days after the publication of the Assistant Secretary's final decision in the Federal Register. An NRTL or applicant pays fees according to the fee schedule in effect on the date the Agency receives an application or commences an on-site assessment.

#### E. Comparison of current and proposed fees

The following table shows the differences between the existing fee schedule and the proposed fee schedule shown in Table A, above.

**Table 6.** Differences between Planned 2013 Fees and the Proposed Fee Amounts

<b>Current activity or category</b>	<b>Planned 2013 Fee Amount*</b>	<b>Proposed activity or category</b>	<b>Proposed Fee Amount</b>
Initial application review	\$17,750	Initial application – Limited review	\$4,160
		Initial application – Detailed management procedures review	\$8,300
		Initial or Expansion application - Site capability review (assuming one site – add \$2,490 for each additional site)	\$2,490
		<b>Subtotal Initial</b>	<b>\$14,950</b>
Expansion-application review (per additional site)	\$8,280	Expansion application – Limited review	\$2,490
		Initial or Expansion application - Site capability review (assuming one site – add \$2,490 for each additional site)	\$2,490
		<b>Subtotal Expansion</b>	<b>\$4,980</b>
Renewal or expansion (other) application review	\$300	Renewal request review	\$1,660
		Expansion application – Limited review	\$2,490
Renewal information review fee	\$2,370	None	\$0

<b>Current activity or category</b>	<b>Planned 2013 Fee Amount*</b>	<b>Proposed activity or category</b>	<b>Proposed Fee Amount</b>
Additional review – initial application (if the application requires substantial revision, submit one-half of initial-application review fee)	\$2,370	None	\$0
Additional review – renewal or expansion application	\$730	None	\$0
Limited review – initial application	\$3,550	Initial application – Limited review	\$4,160
Assessment – initial application (per person, per site – first day)	\$4,440 plus travel expenses	Assessment preparation and close out (per lead auditor, per site)	\$5,610
Assessment – renewal application (per person, per site - first day)	\$4,140 plus travel expenses		
Assessment – expansion application (additional site) (per person, per site - first day)	\$3,550 plus travel expenses		
Assessment – expansion application (other) (per person, per site - first day)	\$2,960 plus travel expenses		
None	NA	Assessment preparation and close out (per assistant auditor, per site)	\$3,320
Assessment – each additional day or each day on travel (per person, per site)	\$1,180 plus travel expenses	Assessment – per day at office, on-site, or on travel (per auditor, per site)	\$830 plus travel expenses
Review and evaluation (\$30 per standard if already recognized for NRTLs and requires minimal review; otherwise, \$296 per standard)	\$30 per standard OR \$296 per standard	Initial or Expansion application - Testing capability review (per standard)	\$2,490
Final report and <u>Federal Register</u> notice – initial application	\$19,520	Federal Register notices – initial application	\$5,500

<b>Current activity or category</b>	<b>Planned 2013 Fee Amount*</b>	<b>Proposed activity or category</b>	<b>Proposed Fee Amount</b>
Final report and <u>Federal Register</u> notice – renewal or expansion application (if OSHA performs on-site assessment)	\$7,390	Federal Register notices – renewal or expansion application	\$3,180
Final report and <u>Federal Register</u> notice – renewal or expansion application (if OSHA performs no on-site assessment)	\$4,440		
On-site audit (per person, per site, first day) nonconformances)	\$7,400 plus travel expenses	Assessment preparation and close out (per lead auditor, per site)	\$5,610
On-site audit (per person, per site, first day)	\$7,400 plus travel expenses	Assessment preparation and close out (per assistant auditor, per site)	\$3,320
On-site audit – each additional day (on-site or on travel) (per person, per site); or review of revised audit response – per on-site or office audit	\$1,180 plus travel expenses	Assessment – per day at office, on-site, or on travel (per auditor, per site)	\$830 plus travel Expenses
Office audit (per person, per site, per day) (lower fee applies if no nonconformances)	\$1,180 or \$2,370	Assessment preparation and close out (per lead auditor, per site)	\$5,610
Supplemental travel (per site – for sites located outside the 48 contiguous U.S. states or the District of Columbia)	\$1,000	None	\$0
Supplemental program review (per program requested)	\$590	None	\$0
Invoice processing fee (per application or audit)	\$300	Included in Assessment preparation and close out (per lead auditor, per site)	\$0

<b>Current activity or category</b>	<b>Planned 2013 Fee Amount*</b>	<b>Proposed activity or category</b>	<b>Proposed Fee Amount</b>
Travel document processing (4 hours, per application or audit)	\$590	Included in Assessment preparation and close out	\$0
Late payment	\$150	Late payment	\$210
Compensatory time for travel (per hour)	\$56.40	Included in Assessment – per day at office, on site, or on travel (per auditor, per hour)	None

\* These fee amounts represent fees that were to have been associated with phase 3 of the fee increase authorized by OSHA's February 2011 final rule pertaining to NRTL Program fees (see footnote 3, above).

As the Table shows, the proposed fees for individual core service activities are often significantly less than the analogous existing fees for such services. These changes arise from the change in the way that OSHA is proposing to calculate the ECR (which excludes some previously included indirect costs but increases the number of direct staff hours) and streamlined review procedures (which decrease the amount of staff hours needed for some tasks in the process). OSHA nonetheless estimates that fees collected under the proposed fee schedule will, *in toto*, approximate the full costs of administering the NRTL Program because, as stated above, OSHA estimates a significant increase in the number of applications the NRTL Program will process and audits the NRTL Program will perform (i.e., a significant increase in the time NRTL Program staff will spend on core service activities).

## **V. Proposed Decision**

OSHA performed its periodic review of the fees it currently charges to NRTLs, as provided under 29 CFR 1910.7(f). Based on this review, OSHA preliminarily determined that the existing fee schedule warrants adjustment, as detailed in this notice. As a result,

OSHA proposes to replace the existing fee schedule with the proposed fee schedule shown in Table A, above. OSHA also proposes to adopt new streamlined procedures for accepting and reviewing applications of organizations seeking to obtain, renew, or expand NRTL recognition, as described above.

OSHA welcomes public comments on this notice. Comments should consist of pertinent written documents and exhibits. Commenters needing more time to comment must submit a request in writing, stating the reasons for the request. Commenters must submit comments or requests for extensions by the due dates, and follow all instructions for submitting comments and requests for extensions, specified in the DATES and ADDRESSES sections of this notice. OSHA will limit any extension to 10 days unless the requester justifies a longer period. OSHA may deny a request for an extension if the request is not adequately justified.

OSHA staff will review all timely-submitted comments to the docket and, after addressing the issues raised by timely-submitted comments, will recommend to the Assistant Secretary for Occupational Safety and Health whether to adopt the proposed NRTL Program fee schedule and new streamlined procedures for accepting and reviewing applications. The Agency will publish a final fee schedule in the Federal Register, as provided under 29 CFR 1910.7, as well as a final decision on whether to adopt the new streamlined procedures for accepting and reviewing applications. The final fee schedule would become effective 30 days after the date of publication of the schedule in the Federal Register, and the final streamlined procedures for accepting and reviewing applications would become effective on the date of publication of the procedures in the Federal

Register.

**Authority and Signature**

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210, authorized the preparation of this notice. Accordingly, the Agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 1-2012 (77 FR 3912, Jan. 25, 2012), and 29 CFR 1910.7.

Signed at Washington, DC, on \_September 16\_\_\_\_\_, 2015.

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**David Michaels,**  
Assistant Secretary of Labor for Occupational Safety and Health.

**BILLING CODE: 4510-26-P**

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